



United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To:

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DATE: October 17, 2006

MEMORANDUM TO: MEMBERS
NETWORK ON EMPLOYEE & LABOR RELATIONS

FROM: ANA A. MAZZI
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Center for Workforce Relations & Accountability Policy

Subject: Case Listing Number 1097

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

61 FLRA No. 124;
61 FLRA 637
0-AR-3944
July 27, 2006

[U.S. Dep't of the Army, Army Tank – Automotive and Armaments Command, Warren, Michigan and AFGE, Local 1658.](#) The Arbitrator denied in part and sustained in part a grievance, which alleged that four grievants were improperly designated as exempt employees under the Fair Labor Standards Act (FLSA). As relevant here, the Arbitrator ordered back pay and statutory liquidated damages for uncompensated overtime for the time that three grievants performed Shift Leader duties in the Tank-Automotive and Armaments Command Operations Center. The FLRA denied the Agency's claims that the award is contrary to 29 U.S.C. § 255(a) and 5 C.F.R. §§ 551.702(a) and (c), which concern the period of time for when backpay may be awarded. Relying on case law, the FLRA found that the arbitrator's award of overtime pay for the period of time after the grievance was filed was proper and that the backpay awarded by the Arbitrator was within the statutory period. However, with respect to one of the grievants, the FLRA determined that the award of FLSA nonexempt overtime pay for a certain time period is contrary to §551.208 because the grievant did not perform those duties for 30 calendar days.

61 FLRA No. 125;
61 FLRA 642;
0-AR-4017
July 31, 2006

[NTEU, Chapter 138 and DHS, United States Customs and Border Protection.](#) The Arbitrator held that Union Chapter Presidents are permitted to wear civilian clothing, rather than uniforms, only when their Union offices are located at sites other than Agency work sites. In reaching this conclusion, the Arbitrator found that the parties had agreed to such an arrangement. The FLRA denied the Union's contrary to law exception, finding that while parties may agree to permit Union representatives to wear civilian clothes in various situations, there is not a right to do so in the absence of an agreement. The FLRA also denied the Union's nonfact and essence exceptions, finding that even if the Arbitrator made a factual error in describing this situation as an agreement, rather than a past practice, the Union has not established that this error would have led to a different result or provided a basis for finding that the Arbitrator's conclusion is irrational, implausible, or otherwise

deficient.

61 FLRA No. 126;
61 FLRA 645;
0-AR-4038
August 3, 2006

[AFGE, Local 1938 and U.S. Dep't of the Army, Corps of Engineers, Huntington District, Huntington, WV.](#) As relevant here, this case concerned the Arbitrator's decision to reduce requested attorney fees awarded to the Union under the Back Pay Act. Specifically, the Arbitrator reduced the rate of hourly attorney pay from \$225 (the prevailing market rate in Washington, D.C. where Union counsel practices) to \$120 by noting that \$120 was comparable with the prevailing market rates in the area of Huntington/Charleston, West Virginia (the location of the hearing). The FLRA granted the Union's exception finding, based on MSPB practice, that the relevant community is the community in which the attorney ordinarily practices. Accordingly, the FLRA modified the Arbitrator's award to reflect the applicable market rate.

61 FLRA No. 127;
61 FLRA 647;
0-AR-4103
August 3, 2006

[AFGE, Local 104 and U.S. National Archives and Records Administration, National Personnel Records Center.](#) The FLRA denied the Union's exceeded authority and essence exceptions to an arbitration award, not otherwise described.

61 FLRA No. 128;
61 FLRA 648;
0-AR-4059
August 4, 2006

[U.S. Dep't of the Air Force, Ogden Air Logistics Command, Hill Air Force Base, Utah and AFGE, Local 1592.](#) The Arbitrator found that the grievant's 2004/2005 performance appraisal was improperly lowered from previous years and ordered the Agency to raise the grievant's rating. Before the FLRA, the Agency argued that the award violates management's right to assign work. The FLRA stated that in order to apply the *BEP* analysis utilized for this type of exception, it is essential to identify the law or contract provision that the arbitrator found violated. Finding that the Arbitrator failed to identify what contract provision or laws, if any, he was enforcing, the FLRA remanded the award for clarification.

61 FLRA No. 129;
61 FLRA 650
0-AR-4035
August 4, 2006

[Merit Systems Protection Board Professional Association and U.S. Merit Systems Protection Board.](#) The Agency announced a plan to close its Seattle office and received voluntary separation incentive payment (VSIP) authority until September 30 for that office. On March 23, the grievant, pursuant to the parties' agreement over relocation preferences, elected reassignment to the San Francisco office instead of a VSIP. On September 20, the grievant notified the Agency that he wanted to receive a VSIP. The Agency informed the grievant he was no longer eligible for a VSIP because, pursuant to his March election, he had been reassigned to San Francisco, which did not have VSIP authority. The grievant retired effective September 30. The Arbitrator denied the grievance alleging that the Agency's refusal violated the parties' agreement. The FLRA denied the Union's fair hearing exception, finding that the Arbitrator did not err in relying on extrinsic and parol evidence in interpreting the parties' agreement. The Authority also rejected the Union's claim that the award fails to draw its essence from the parties' agreement because the agreement unambiguously gave employees until September 30 to accept the VSIP offer, whether or not an employee had already been reassigned to another office. Specifically, the FLRA determined that the record evidence supported the Arbitrator's findings that the agreement provided an option either to separate with a VSIP or relocate and did not refer to a tryout period for the Seattle employees.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

06 FSIP 24
July 14, 2006

[Dep't of the Navy, Atlantic Ordnance Command, Yorktown, VA and Local R4-1, NAGE, SEIU.](#) The impasse before the Panel concerned the amount of official time the Union's officers and stewards should be granted to perform representational duties. The Agency proposed to significantly reduce the amount of official time provided in the expired collective bargaining agreement, citing that the current number of bargaining unit employees is substantially lower than the number in existence at the time of that agreement and that ULP charges, grievances and administrative appeals pursued by the Union in the past few years has been minimal. The Union also proposed a reduction, but not to the extent proposed by the Agency. The Panel agreed with the Agency, finding its proposal a "more reasonable basis" for resolving the dispute.

05 FSIP 137
July 18, 2006

[Dep't of the Treasury, Bureau of Alcohol, Tobacco, Firearms and Explosives, Washington, D.C. * and NTEU.](#) The impasse before the Panel concerned the equipment that should be provided to telework participants and, more specifically, whether the Agency should contribute to the cost of high-speed Internet service. Under the Agency's proposal, all bargaining unit employees participating in telework would receive laptops. The Agency also stated that because a majority of the work can be done without having access to high-speed Internet, it would be inefficient to require management to pay 50 percent of an employee's high speed Internet access cost. The Union argued that the Agency's refusal to provide high speed Internet service "calls into question" its commitment to telework and will hinder employees' efforts to be fully productive. The Union also provided a lower estimate of the annual cost than the one provided by the Agency. The Panel agreed with the Agency, finding that the expense of the Union's proposal is not insubstantial and that the work product will not be hindered by lack of high-speed Internet access.

* This unit has since been reassigned to the Department of Justice.

06 FSIP 79
July 24, 2006

[Dep't of the Army, Installation Management Agency, Installation Adjutant General, Headquarters, Fort Bragg Garrison Command \(Airborne\), Fort Bragg, NC and Local 1770, AFGE, AFL-CIO.](#) The impasse before the Panel concerned whether the Agency's decision to terminate the 5/4-9 compressed work schedule (CWS) is supported by evidence that the schedule has caused an adverse agency impact. The Agency asserted that the 5/4-9 CWS has diminished the level of service provided to veterans and caused a reduction in productivity. The Union claimed that the Agency has not provided sufficient data to support its assertion. The Panel ordered the Agency to rescind its determination to terminate the 5/4-9 CWS, finding that the Agency had not demonstrated that the 5/4-9 CWS has reduced productivity or diminished the level of services furnished to soldiers.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

SF-0752-05-0625-I-1
2006 MSPB 234
August 8, 2006

[Lopez v. Department of the Navy.](#) The Board remanded the appeal to an MSPB regional office to determine whether the appellant, who prior to accepting the excepted service appointment from which she was removed held a competitive service position with the agency, was given notice from the agency that her acceptance of that appointment would subject her to a two-year trial period. If she was not notified, the MSPB region is to determine whether she would have accepted the position had she been notified because when an employee moves between positions within the same agency, the agency must inform the employee of

any affect on appeal rights.

CH-0752-04-0620-I-2
2006 MSPB 246
August 14, 2006

Doe v. Department of Justice A Federal Bureau of Investigation (FBI) agent was removed for “Unprofessional Conduct – Videotaping Sexual Encounters With [FBI]Women Without Their Consent.” Based on specific evidence, the Board found that a nexus between the misconduct and the efficiency of the service and upheld the removal.

AT-0752-05-0396-I-1
2006 MSPB 251
August 15, 2006

Hay v. U.S. Postal Service The Board concluded that it would be erroneous to apply collateral estoppel and preclude the employee from relitigating whether he is a preference eligible where the agency may have failed to timely notify the appellant and clearly did not notify the MSPB administrative judge that it had changed its records to reflect that the appellant was a preference eligible entitled to MSPB appeal rights. The Board ordered the case remanded to resolve a number of issues regarding the timeliness of the employee’s appeal and whether there was good cause for any delay.

DC-0432-05-0526-I-1
2006 MSPB 255
August 16, 2006

Jackson-Francis v. Office of Government Ethics. The Board reversed the agency’s performance-based removal action because it found the single critical element which formed the basis for the action was an invalid “backwards” standard.